

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re)	Case No. 03-02281
)	Chapter 7
KRISTIN KAY FILSTRUP,)	
)	
Debtor.)	
<hr style="width: 40%; margin-left: 0;"/>)	
)	Adv. Pro. No. 03-90058
BRETT CHRISTIAN FILSTRUP,)	
)	
Plaintiff,)	
)	
vs.)	
)	
KRISTIN KAY FILSTRUP,)	
)	
Defendant.)	
<hr style="width: 40%; margin-left: 0;"/>)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial of this adversary proceeding was held on April 12, 2004.

Curtis M. Kam, Esq., represented the plaintiff and David B. Rosen, Esq., represented the defendant. The issue in this case is whether the debt owed by Ms. Filstrup to Mr. Filstrup under a divorce decree is dischargeable pursuant to section 523(a)(15).

Based on the evidence received at trial, the court makes the following:

FINDINGS OF FACT

1. Plaintiff Brett Christian Filstrup and defendant Kristin Kay Filstrup were married. On June 6, 2002, the Family Court of the First Circuit, State of Hawaii, entered a Divorce Decree (Without Children) (Exhibit “G”) which dissolved the marriage and divided the parties’ assets and debts.

2. The Divorce Decree provided that Ms. Filstrup would pay Mr. Filstrup \$8,000 in monthly payments of \$100.

a. Ms. Filstrup testified that Mr. Filstrup added this provision to the Divorce Decree after she signed it and before he submitted it to the Family Court. This court makes no finding on this issue because it is not necessary to the disposition of this adversary proceeding. In the circumstances of this case, the court can determine the dischargeability of the debt without determining how much is validly owed.

b. Ms. Filstrup made the required payments to Mr. Filstrup until about September 2003, but she then told Mr. Filstrup that she could not make any more payments and that she would resume payments when she was able. About a month later, she told Mr. Filstrup that she was not going to make any more payments. The remaining debt owed to Mr. Filstrup under this portion of the Divorce Decree is approximately \$6,100.

3. The Divorce Decree also made Ms. Filstrup responsible to pay certain joint debts.

a. Ms. Filstrup was to pay a debt to Bank of Hawaii. After Ms. Filstrup stopped making payments, Mr. Filstrup paid approximately \$4,600 in satisfaction of the debt to Bank of Hawaii in order to protect his credit.

b. Ms. Filstrup was awarded a vehicle that was leased jointly from Honda Financial Services. When Ms. Filstrup defaulted on the payments and turned the car in, Mr. Filstrup cured the default, took possession of the vehicle, sold it at a loss, and paid the deficiency to protect his credit, at a total cost of approximately \$3,800.

4. Ms. Filstrup filed a petition for relief under chapter 7 of the Bankruptcy Code on July 30, 2003. Mr. Filstrup filed a timely complaint objecting to the discharge of Ms. Filstrup's obligations to him pursuant to section 523(a)(15) of the Bankruptcy Code.

5. Ms. Filstrup is thirty years old. She has a high school degree and has taken some community college courses but has never earned a college degree. She is a licensed massage therapist. Substantially all of her income is earned from her work as a massage therapist.

6. Ms. Filstrup's take-home income, after the payment of business expenses and taxes, is about \$15,000 per year. There is no realistic prospect that she could increase her income as a massage therapist. She works seven days a week and provides therapy to as many clients as she can find and is physically able to treat.

7. About six or seven years ago, in the early years of her marriage to Mr. Filstrup, Ms. Filstrup had entry level positions with two major corporations. She earned about \$30,000 per year in those jobs. She left those positions because she was unhappy with the work and knew that she could not have a successful career in a job that made her unhappy. She finds her work as a massage therapist enjoyable and fulfilling. She has no skills, training, or work experience that would qualify her for any job more remunerative than that of a massage therapist.

8. In November 2003, after she filed her bankruptcy petition, Ms. Filstrup remarried. Her current husband has a full-time job as a waiter. He earns about \$13,000 per year. Together, Ms. Filstrup and her new husband earn barely enough to meet their current living expenses. Their rent of about \$2,000 per month consumes more than three-quarters of their take-home income. All of Ms. Filstrup's living and business expenses are reasonable and necessary.

9. Ms. Filstrup has no savings and no assets apart from what she needs for daily work and life. She is one of two members of a limited liability company through which she conducts her work in massage therapy. The income that she receives from the limited liability company is entirely based on her work. Her interest in the limited liability company has no independent value. There is little or no equity in the automobile that she uses.

10. Ms. Filstrup is not able to pay any portion of her debt to Mr. Filstrup from her income or property not reasonably necessary to be expended for her maintenance or support and for the payment of expenditures necessary for the continuation, preservation, and operation of her business.

11. Mr. Filstrup appears to be approximately the same age as Ms. Filstrup. He holds a masters degree in business administration. In 2003, Mr. Filstrup earned about \$155,000 from his job with Crestone International, Inc. In 2002, he earned about \$107,000 from the same job. His income for the first quarter of 2004 was about the same as his income for the first quarter of 2003. Mr. Filstrup is able to support himself and provide substantially all of the support for his new fiancée, who has had no income for the last year, while she and Mr. Filstrup have attempted to start a new business. After the payment of taxes and living expenses, he has disposable income of about \$4,000 per month.

12. When he is not traveling for his job, he lives rent-free in a home owned by his new fiancée in Oklahoma. When he is traveling for his employer, his employer or the customer pays for his living expenses. About a year ago, he purchased a home in Oklahoma at an auction for \$85,000. He and his fiancée have not moved into the new home, and he has not rented it out, because it needs at least \$20,000 of repairs to render it habitable. He borrowed \$123,000 against the house. He did not use the “overborrowing” to repair the home; instead, he lost about \$30,000 in the stock market and used the rest to pay off credit card debts. Mr. Filstrup has about \$57,000 in a 401(k) retirement account.

13. Ms. Filstrup would realize a substantial benefit if her obligation to Mr. Filstrup were discharged. If she were required to pay that debt, she would have to stop paying expenses that she must pay in order to maintain her business and live at a minimal standard. In contrast, discharging the debt would deprive Mr. Filstrup of a relatively small addition (\$100 per month) to his already sizable disposable income and would deprive him of reimbursement for the joint debts which Ms. Filstrup was supposed to pay, neither of which would materially change his lifestyle. The benefit to Ms. Filstrup of discharging the debt substantially outweighs the detrimental consequences to Mr. Filstrup.

Based on the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

1. The issue is whether the debt owed by Ms. Filstrup to Mr. Filstrup pursuant to the Divorce Decree is dischargeable pursuant to section 523(a)(15).

2. Section 523(a) provides that:

A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt --

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

11 U.S.C. §523(a) (emphasis added). “It is the debtor and not the creditor who has the burden of persuading the bankruptcy court that a nondischargeable debt under § 523(a)(15) nonetheless qualifies for discharge.” In re Myrvang, 232 F.3d 1116, 1121 (9th Cir. 2000).

3. The debt owed by Ms. Filstrup to Mr. Filstrup was incurred in connection with a divorce decree and, thus, is covered by section 523(a)(15).

4. The debt owed by Ms. Filstrup to Mr. Filstrup pursuant to the Divorce Decree is dischargeable pursuant to section 523(a)(15)(A). All of Ms. Filstrup’s income and property are reasonably necessary for her maintenance and support and for the continuation, preservation, and operation of her business. Ms. Filstrup cannot pay the debt from either her income or her property.

5. The debt is also dischargeable under section 523(a)(15)(B). The "relative harm test" of section 523(a)(15)(B) requires the debtor to show that the benefit of discharge to the debtor exceeds the detriment of discharge to the former spouse. In re Short, 232 F.3d 1018, 1022 (9th Cir. 2000). If Ms. Filstrup were required to pay the debt pursuant to the Divorce Decree, she would not be able to maintain her business or live at a minimal standard. Discharging the debt would confer a substantial benefit on Ms. Filstrup by permitting her to continue her

business and to live at her current frugal standard. In contrast, discharging the debt would not materially reduce Mr. Filstrup's standard of living. The benefit to Ms. Filstrup of discharging the debt substantially outweighs the detrimental consequences to Mr. Filstrup, her former spouse.

6. Ms. Filstrup seeks reasonable attorney's fees pursuant to section 523(d). Section 523(d) provides that:

If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. §523(d). Section 523(d) provides for attorney's fees related to the determination of dischargeability of a consumer debt under section 523(a)(2) and, thus, does not apply to the determination of dischargeability under section 523(a)(15). Even if section 523(d) were applicable, Ms. Filstrup is not entitled to attorney's fees because Mr. Filstrup was substantially justified in seeking a determination of the dischargeability of Ms. Filstrup's debts under the Divorce Decree.

7. No general right to attorney fees exists under the Bankruptcy Code. In re Baroff, 105 F.3d 439 (9th Cir. 1997). A prevailing party in a

bankruptcy proceeding may, however, be entitled to an award of attorney fees in accordance with applicable state law if state law governs the substantive issues raised in the proceedings. Id., see Thrift Oil Co. V. Bank of America Nat. Trust and Sav. Ass'n, 322 F.3d 1039, 1059 (9th Cir. 2003); Renfrow v. Draper, 232 F.3d 688, 694 (9th Cir. 2000). “[I]f a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in the bankruptcy proceedings, attorney's fees are available, but only to the extent that they were incurred litigating the state law issues.” Renfrow v. Draper, 232 F.3d at 694; see In re Baroff, 105 F.3d 439; In re Hashemi, 104 F.3d 1122, 1124 (9th Cir 1996). In this adversary proceeding, no state law issues were litigated and, therefore, the prevailing party has no right to an award of attorneys fees.

8. An appropriate separate judgment shall be entered.

DATED: Honolulu, Hawaii, May 7, 2004.



/s/ Robert J. Faris
United States Bankruptcy Judge